SUPREME COURT, U. S.

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No. 222

In the Supreme Court of the United States

OCTOBER TERM, 1970

CHARLES BAKER, et al.,

Petitioners,

vs.

F & F INVESTMENT CO., et al.,

Respondents.

SIDNEY CLARK, et al.,

Petitioners,

vs.

UNIVERSAL BUILDERS, INC., et al.,

Respondents.

PETITIONERS' REPLY

WILLIAM R. MING, JR.
ALDUS S. MITCHELL
123 W. Madison Street
Chicago, Illinois 60602

THOMAS J. BOODELL, JR.
5757 S. Woodlawn
Chicago, Illinois 60637

THOMAS P. SULLIVAN
JOHN G. STIFLER
DAVID C. ROSTON
135 S. LaSalle Street
Chicago, Illinois 60603

Attorneys for Petitioners

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

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PETITIONERS' REPLY

I.

RESPONDENTS' JURISDICTIONAL ARGUMENTS ARE WITHOUT MERIT.

A.

Petitioners Have Standing To Represent Those Members Of The Plaintiff Classes Whose Claims Have Been Held To Be Barred By The Statute Of Limitations.

At the heart of respondents' argument that petitioners lack standing is the assumption that the District Court's

ruling with respect to the statute of limitations does not affect any member of the plaintiff-class. This assumption has no basis in fact.

The complaint in each of these cases alleges that the action is brought pursuant to Rule 23(b)(3), on behalf of a class of similarly situated persons. The relevant allegations of the complaints are identical (B. App. 8-9; C. App. 5-6):

> "2. Plaintiffs bring this action on their own behalf and on behalf of others similarly situated in accordance with the provisions of Rule 23 of the Federal Rules of Civil Procedure. . . .
>
> "3. Each of the individual plaintiffs and each of the members of the class is a resident of Chicago, Illinois, a citizen of the United States of America, and a member of the Negro race.
>
> "4. Each of the individual plaintiffs and each of the members of the class has executed an installment contract with one of the defendants under which the plaintiffs agreed to purchase specified real property and improvements thereon in the City of Chicago, Illinois."

The complaint in *Baker* also alleges (B. App. 23):

> "13. Beginning at a date unknown to plaintiffs, but prior to January 1, 1952, and continuing until the present, the defendants individually and in conspiracy with one another, knowingly and willfully, and for the purpose of deceiving and defrauding plaintiffs and others, and of depriving plaintiffs and other members of the Negro race of their constitutional and statutory rights:
>
> > "(1) Continued and promoted the custom and usage of residential racial segregation in Chicago and environs.

"(2) Exploited the custom and usage of residential racial segregation to the detriment of plaintiffs and to the profit of defendants.

"(3) Utilized the system of state and local laws and courts to enforce and threaten to enforce the custom and usage of residential racial segregation to the detriment of plaintiffs and to the profit of defendants."

A similar allegation is found in *Clark* (C. App. 11):

"10. Beginning at a date unknown to plaintiffs, but at approximately January 1, 1958, and continuing until the present, defendants, for the purpose of deceiving and defrauding plaintiffs and other members of the Negro race of their constitutional and statutory rights:

"(a) Continued and promoted the customs and usage of residential racial segregation in Chicago and environs.

"(b) Exploited the customs and usage of residential racial segregation to the detriment of plaintiffs and to the profits of defendants.

"(c) Utilized the system of state and local laws and courts to enforce and threaten to enforce the custom and usage of residential racial segregation to the detriment of plaintiffs and to the profit of defendants.

"(d) Refused to sell housing to Negroes on the same terms and conditions that would have been available to whites."

Pursuant to the requirement of Rule 23(c), the District Court proceeded to define the classes immediately after the filing of the complaints. Prior to determining the statute of limitations defenses, the District Court defined the plaintiff class in *Baker* as those Negroes who entered into installment contracts to purchase residential real estate in

the City of Chicago from the named defendants after January 1, 1952. (App. 64; Order of March 7, 1969.) No order defining the class in *Clark* was entered until June 5, 1969. It was clearly the District Court's intention, however, to have that case governed by its opinion on the class action filed in *Baker* on March 28, 1960. Thus, the plaintiff classes were originally defined without respect to the statute of limitations. The named plaintiffs and their attorneys were authorized to represent all members of the plaintiff classes.

After determining that these cases should proceed as class actions, the District Court ruled on the motions to dismiss, which relied, in part, on the statute of limitations issues. The court ruled that the statute barred the claims of those members of the plaintiff classes whose contracts had terminated more than five years prior to the commencement of the actions. The District Court, therefore, redefined the plaintiff classes to exclude those persons whose claims were barred by the statute of limitations. (App. 29; B. App. 193; C. App. 77.) As representatives of the entire class, petitioners have standing to represent in this Court the interests of such persons as were excluded.

When this case was pending before the Court of Appeals respondents did not object to petitioners' standing, although it was the same there as here. Similarly, the Court of Appeals did not raise any question as to petitioners' standing. We submit that respondents' failure to question petitioners' standing in the Court below amounts to a waiver of any defect in this regard.

In any event, having sued for, and having been authorized to represent the plaintiff class as originally defined, petitioners have standing to represent those members of the plaintiff class whose claims have been held to be barred by the five-year statute of limitations.

B.

Rule 34(2) Of This Court Is Not Jurisdictional.

Petitioners' motion to extend time within which to file their petition for writ of certiorari to June 5, 1970, was granted by Mr. Justice Marshall. Respondents assert that this Court lacks jurisdiction since the motion was made less than 10 days prior to the date on which the time for filing a petition expired, in violation of Rule 34(2) of this Court. The view that this Court's rules are jurisdictional has been rejected by this Court in the recent holding of *Schacht v. United States*, 90 S. Ct. 1555 (1970). The ten day period in Rule 34(2) is not statutory, and was established for administrative convenience. The decision in *Schacht* states:

> "The procedural rules adopted by the court for the orderly transaction of business are not jurisdictional and can be relaxed by the court in the exercise of its discretion when the ends of justice so require. [Citing cases.]"

Respondents were not prejudiced by this minor delay. They alone petitioned the Court of Appeals for rehearing. Moreover, their time in which to file a petition for Writ of Certiorari did not expire until June 3, 1970. The respondents' challenges to the jurisdiction of this Court are invalid and should be summarily dismissed.

II.

RESPONDENTS' DETAILED SUBSTANTIVE ARGUMENT DEMONSTRATES THAT SUBSTANTIAL, NON-FRIVOLOUS ISSUES ARE PRESENTED BY THE PETITION IN THIS CASE.

The remainder of respondents' brief in opposition underscores the significance of the question presented. By

separately analyzing the statutes, history and cases which petitioners feel must be read in conjunction with one another, respondents demonstrate that petitioners present substantial questions warranting consideration by this Court. Respondents cite no new cases, but merely juggle about authorities in an attempt to justify a different conclusion. It is for precisely this reason that petitioners request that this Court examine this important issue and set forth the appropriate standards to achieve the uniformity required in civil rights actions.

Respectfully submitted,

WILLIAM R. MING, JR.
ALDUS S. MITCHELL
123 W. Madison Street
Chicago, Illinois 60602

THOMAS P. SULLIVAN
JOHN G. STIFLER
DAVID C. ROSTON
135 S. La Salle Street
Chicago, Illinois 60603

THOMAS J. BOODELL, JR.
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